RE: Rule 2-200
8/27-28/04 Commission Meeting
Open Session Item III.C.

-----Original Message-----
From: Vapnek, Paul W. [mailto:pwvapnek@townsend.com]
Sent: Thursday, July 29, 2004 2:40 PM
To: Stanley W. Lamport ; Anthonie Voogd (E-mail); Edward P. George Jr. (E-mail); hbsondheim; Jerome Sapiro Jr. (E-mail); Ignazio J. Ruvolo (E-mail); Karen Betzner; kemohr; Kevin E. Mohr; kevinm; kmelchior; lfoy; mlt1@cwclaw.com; martinez; McCurdy, Lauren; pecklaw@prodigy.net; Difuntorum, Randall; JoElla Julian
Subject: Rule 2-200

I have reviewed Mark's comments and agree with most of them (and will not repeat them here). My principal disagreement is with shifting 2-200(B) elsewhere. I would keep this provision where it is, since it is complementary to 2-200(A) and both strictures should be together.

Another issue was brought to my attention recently. There was a suggestion made that the referring lawyer could sign up the client, specifically advising in writing that a referral would be made, but without identifying the lawyer to whom the client was being referred. My comments were to the effect that a provision such as was suggested would not hold up. In the usual referral case the lawyer doing the referring wants to have the referred-to lawyer do all the work and just send the 1/3 fee when the case is over. But the referred-to lawyer has to meet with the client and get the facts, draft the complaint, etc., and perhaps even take the case to trial. Thus I don't see how the referring lawyer could keep the other lawyer's name out of it. While the rule doesn't explicitly require the disclosure of the name of the lawyer to whom the client is being referred, you could interpret the term "full disclosure" in the rule as requiring disclosure of the name of the referred-to lawyer. Perhaps we should add to the discussion a definition of full disclosure that includes the name of the lawyer to whom the referral is to be made, along with all the other information such as is outlined in the last paragraph of the Discussion in Stan's draft.

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----- Original Message -----

From: CommissionerJ2@aol.com

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Cc: kevin_e_mohr@compuserve.com ; kemohr@attbi.com ; kevinm@wsulaw.edu

Sent: Friday, July 30, 2004 12:08 PM

Subject: Fwd: Correction 1-200??

Happy July 30th,

I am herewith submitting my version of what I think 2-200 should look like. I have I have utilized what I believe is Stan's last draft (5/11/04) and made my changes which I have underlined. My changes are for clarity and brevity only. The main issue which concerns me is whether or not the client gets full disclosure in writing about the division of the fees and how it affects her overall cost.

Rule 2-200:

(A) A member shall not be a part to or make an agreement to and shall not divide a fee for legal services with a lawyer who is not in the same law firm as the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and
(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is definied in rule 4-200.
(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer outside of their law firm. Such exchange shall not be for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member of the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule. It is not a violation provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouragaed in the future.

Discussion:

(1) A division of a fees under rule 2-200 occurs when an outside lawyer receives a portion of specific fees paid by a client. The criteria to determine whether there is a divion of fees is as provided for in *Chambers v Kay* (2002) 29Cal.4th.

(2) When there is an agreement to divide fees, it is preferable that the disclosure to the client under paragraph (A) (1) occurs before members enter into such an agreement. Failure to do so may be construed as a breach of a member's duty to keep the client reasonably informed of significant developoments related to the represenation of a client under Rule 3-500 and Business and Professions code section 6068(M).

JoElla

-----Original Message-----

From: McCurdy, Lauren

Sent: Friday, July 30, 2004 2:55 PM

To: Ethics: Rules Revision Commission

Subject: [rrc] Agenda Item III.C Rule 2-200

Commission Members, Liaisons and Interested Persons:

The following message is forwarded at the request of Mark Tuft.

-----Original Message-----

From: Mark Tuft [mailto:MTuft@cwclaw.com]

Sent: Thursday, July 29, 2004 9:55 AM

To: Harry B. Sondheim (E-mail); Harry B. Sondheim (E-mail); Harry Sondheim (E-mail); Kevin Mohr (E-mail); Kevin Mohr (E-mail 2); Kevin Mohr (E-mail 3); Raul L. Martinez (E-mail); Difuntorum, Randall; Anthonie M. Voodg (E-mail); Edward E. Kallgren (E-mail); Linda Q. Foy (E-mail); Paul Vapnek (E-mail); Ellen Peck (E-mail); Stan Lamport (E-mail); Ignazio J. Ruvolo (E-mail); Kurt Melchior (E-mail); Jerome Sapiro Jr (E-mail); Karen Betzner (E-mail); McCurdy, Lauren; Yen, Mary

Subject: Agenda Item III.C Rule 2-200

The following are my comments on the current draft of rule 2-200:

1. Format: I favor a separate rule addressing the division of fees among lawyers who are not in the same firm. I do not like the ABA approach where the fee sharing rule is buried at the end of rule 1.5

2. Referral fees: I agree that the rule should allow for pure referral fees. Time and case law have shown there is no abuse in allowing attorneys to receive a referral fee for recommending counsel without either performing legal services commensurate with the fee or being responsible for the legal work performed - provided the requirements of the rule are met. The trade off is that there should be strict adherence to the rule.

3. Rule 2-200(B): Rule 2-200(B) should be relocated to rule 7.2 along with rule 1-320(B). The current version of 1-310X includes rule 1-320(A). I agree that the second sentence in rule 2-200(B) appears to contradict the first sentence. I would delete the second sentence from the rule and make it an explanatory comment in the discussion.

4. Partner, associate, shareholder and of counsel: The language in rule 1.5(e) is clearer and eliminates much of the troublesome case law on the legal relationships between lawyers seeking to share a fee. These issues are more properly covered in a single definition of "law firm," which should apply uniformly to all of the rules. I am happy to see that Stan has changed "firm" to "law firm" in the revised rule. I believe this approach should take care of many of Ellen's concerns. I recommend that we consider including comment 8 in rule 1.5 for further clarification.

5. "Lawyer" vs. "Member": Although the commission has voted to defer this issue, this rule is another example where the use of both terms results in greater confusion as shown by Becky Stretch's comment.

6. Consent Requirement: I agree we should maintain the consent requirement in current rule 2-200(A).

7. Reasonable v. Unconscionable Fee Standard: We should defer the decision on the standard for purposes of rule 4-200 until we get to that rule. Although I agree that disputes over the reasonableness of a fee should not be the subject of discipline, lawyers in California, as a matter of policy, should not be permitted under our rules to charge unreasonable fees. For present purposes, it is sufficient for rule 2-200(A)(2) to provide: ". . . and does not violate rule 4-200." If we are to include the standard in current rule 4-200 in rule 2-200(A)(2), it should read: " . . . and is not illegal or unconscionable under rule 4-200," since rule 4-200 utilizes both fee standards.

8. Timing of the Client's Consent: I agree that the client's consent should be obtained as a condition of entering into the fee sharing agreement. Concerns over discipline for violating the rule where a division of the fee has not occurred can be handled in the discussion or as a matter of state bar policy or as a matter in mitigation. The public protection objectives of this rule out weighs this concern, which in my view presents only a slight risk of over zealous prosecution of lawyers. I am influenced on this issue by the fact that the rule allows for pure referral fees. A client or prospective client should know the basis for a lawyer's recommendation of a particular counsel.

9. Definition of a Division of a Fee: I am opposed to including the definition in the current draft in the discussion of the rule. I agree with Jerry that the definition is confusing. It may also be under inclusive. Our purpose is served by citing the case law and ethics opinions as guidance on what constitutes a division of a fee in a particular situation rather than trying to come up with a "one size fits all" definition.
